Robert Orr/Sysco Food Services, LLC *and* Teamsters Local Union, No. 480, affiliated with International Brotherhood of Teamsters *and* James D. Garza. Cases 26–CA–20384, 26–CA–20460, 26–CA–20622, 26–CA–20726, 26–CA–20746, and 26–CA–20752

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 9, 2003, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below and to adopt the recommended Order as modified.[3]

We adopt the judge's finding that the Respondent committed numerous violations of Section 8(a)(1), (3), and (4) of the Act in the period before, during and after a rerun representation campaign. Thus, the Respondent interrogated employees about union activities;[4] solicited grievances and impliedly promised to remedy them; prohibited employees from talking among themselves in retaliation for the Union's winning the rerun election;[5] changed employee break schedules; delayed an employee's scheduled job change; threatened an employee with layoff; requested employees to report back to it regarding other employees' union sentiments; equated an employee's vote for the Union with disloyalty to the Respondent; and more strictly enforced work rules following the union election victory. All of this conduct was in violation of Section 8(a)(1). We further agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Tommy Thomas, James Garza, and Chris Shouse, and by issuing a warning to and discharging employee James Utley.[6] The Respondent's discharge of Shouse also violated Section 8(a)(4) and (1) of the Act.

In addition, we agree with the judge, for the reasons she states and as further set forth below, that the Respondent violated Section 8(a)(3) and (1) by discharging employees Ben Kelley and Greg Jaster because of their union activities. Contrary to our dissenting colleague, the Respondent has not shown that it discharged Jaster and Kelley because they engaged in workplace violence.

Facts

The Respondent operates a large wholesale food and food service warehouse, as well as a retail store located near the warehouse. On June 14, 2000, a representation election was conducted among the Respondent's warehouse and retail store employees. The Union lost the election and filed objections. In August 2001, the Board ordered a second election, which was held September 6, 2001. The Union won the second election and the Respondent filed objections with the Board. The allega-

[1] The Respondent has excepted to some of the judge's credibility findings. It is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case and made prejudicial rulings, or demonstrated bias against the Respondent in her analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

[2] We correct the judge's conclusion of law 1 to add "by equating employees' union support with disloyalty to the Respondent."

[3] We shall modify the judge's recommended Order and notice to correct inadvertent omissions, and to conform with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] Without necessarily agreeing with all the elements of *Passavant Memorial Hospital*, 237 NLRB 138 (1978), Chairman Battista agrees with the judge's finding that the Respondent's August 22, 2001 notice to employees failed to cure the unlawful interrogation of the Respondent's Cash and Carry retail employees. Chairman Battista relies on the fact that the notice did not mention the unlawful solicitation of grievances and the implied promise to remedy them, violations that occurred during the same conversation as the interrogation, which the Respondent sought to cure.

[5] The judge found that the Respondent prohibited its employees from talking among themselves "about the third week in August," i.e., prior to the second election. However, the record is unclear as to whether the prohibition came before or after the second election. In either case, we agree with the judge that the prohibition on talking was unlawful as it was clearly in response to the employees' union support.

[6] In cases like this one, involving 8(a)(3) violations that turn on the employer's motivation, we apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that analysis, the General Counsel must initially establish union or protected activity, knowledge, animus and adverse action. Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove that the same action would have taken place even absent any protected activity. *Central Plumbing Specialties*, 337 NLRB 973, 974 (2002). We agree with the judge that the General Counsel met his burden of proof with respect to each of the discharges and that the Respondent did not rebut the General Counsel's evidence.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) by discharging employee James Garza, we do not rely on the judge's finding that Garza reported the accident to a supervisor. The record does not contain such evidence. Instead, we rely on the judge's alternative finding that because of Garza's union activities he was treated more severely than other employees who failed to report accidents and who were not discharged.

tions here occurred in the context of that second election, and while the Respondent's objections were pending before the Board.

Kelley and Jaster were known union supporters. Kelley was a member of the Union's in-house organizing committee and the Union had notified the Respondent in writing of his role. Jaster became a union supporter after the second election. In late 2001, Jaster openly discussed his union support with other employees, including Night Warehouse Manager Steve Owensby's son, and regularly took lunchbreaks with Kelley and other open union supporters.

Kelley and Jaster were known to be good friends who worked together as order selectors in the Respondent's freezer area. In May 2002, while operating the double pallet jacks that they use to assemble orders, Kelley and Jaster almost collided. They began to argue, each blaming the other in a loud voice for the near accident. When Jaster pointed his finger at Kelley, holding it close to Kelley's face, Kelley brushed it aside with his open hand. A supervisor stepped between them, and the argument ended. Within a few hours, Kelley and Jaster resumed their friendly ways, and ate lunch together. A full 2 weeks later, the Respondent discharged both men, asserting that they had violated its "zero tolerance" policy concerning workplace violence.

Analysis

Wright Line, supra, requires the General Counsel to make an initial showing that protected conduct of union supporters was a motivating factor in an employer's decision to take disciplinary action. Proof of such discriminatory motivation can be based on direct evidence of such union animus or can be inferred from circumstantial evidence based on the record as a whole. To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at 3 (2003).

Here, the Respondent's union animus is evident through its many violations of Section 8(a)(1), (3), and (4) found to have occurred before and after the second election campaign. The second election was conducted in early September 2001. Just prior to and after that election, the Respondent engaged in an antiunion campaign described above. After the election, the Respondent launched a related campaign of discharging union adherents. Starting September 7, the day after that second election, and continuing through late October and into February and March 2002, the Respondent unlawfully discharged four union activists other than Kelley and Jaster. The final discharges—those of Kelley and Jaster—occurred just 2 months later, in May 2002. Thus, contrary to the Respondent's contentions, the fact that Kelley's and Jaster's discharges occurred some 8 months after the election does not establish that those discharges were not based on anti-union considerations.[7] Cf. *Globe Security Systems*, 301 NLRB 1219, 1224–1225 (1991) (termination violated Act even though it occurred 6–7 months after employee petition opposing new pay system).

Furthermore, it is clear that the Respondent was unlawfully motivated in discharging the two. Contrary to our colleague, we find that the Respondent has not shown that it had a valid reason for the discharges. First, we agree with the judge that the incident could not reasonably have warranted discharge under the Respondent's own policies. The Respondent's human resource manager, Dorothy Merkle, testified that workplace violence consisted of conduct involving any touching. However, this testimony conflicts with the very language of the Respondent's employee handbook which defines workplace violence as "hostile physical contact." Neither Jaster's finger pointing nor Kelley's brushing that finger aside rises to the level of such "hostile physical contact." Merkle's attempt to alter that standard to encompass Jaster's and Kelley's conduct is indicative of the Respondent's unlawful motivation. Further, the fact that the Respondent allowed Jaster and Kelley to work together in the warehouse for 2 additional weeks before discharging them is inconsistent with a belief that their conduct constituted hostile physical conduct within the meaning of its handbook. See, e.g., *Embassy Vacation Resorts*, supra at slip op. 4 (proffered reasons for discharge inconsistent with action of letting discriminatee work on three occasions with employee he had allegedly threatened).[8] Had the Respondent truly been worried about the two employees' capacity for violence it presumably would have placed them on leave or suspension while conducting an investigation.

Second, even were we to agree with our dissenting colleague that the incident violated the Respondent's "zero tolerance" workplace violence policy, the record shows that Jaster and Kelley were treated more severely than other employees who engaged in more serious misconduct. On two occasions, a supervisor had to step between Jimmy Kelly, an employee who had worn a "vote no" T-shirt, and another employee, to break up heated altercations. Twice, Kelly, who is 6'4" or 6'5" and weighs 230-240 pounds, cursed and pounded his fist into his other hand. Another time, Jimmy Kelly had to be physically restrained by employee James Utley from attacking employee Shawn Carruthers. Jimmy Kelly was

[7] Moreover, the Respondent's objections to the second election were still pending before the Board during this time period.

[8] See *299 Lincoln Street, Inc.*, 292 NLRB 172, 202 (1988).

not discharged for any of these incidents, and was only reprimanded for one of them. Finally, Ben Kelley testified that in 1997 an employee threatened him with a shotgun that he had out in his truck. Kelley testified that the employee was not disciplined even though a supervisor was informed of the exchange. These incidents stand in sharp contrast to the Respondent's conduct toward Kelley and Jaster.

We do not dispute our dissenting colleague's observation that the Respondent has a legitimate concern about workplace violence. It is the Board's function, however, to determine whether the Respondent's actions were actually motivated by that concern. Under all these circumstances, we find that the Respondent has not established that it would have discharged Jaster and Kelley had they not supported the Union. Accordingly, we find that their discharges violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Robert Orr/Sysco Food Services, LLC, Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1 (a).

"(a) Interrogating employees regarding their union sentiments and activities, interrogating employees about the union activities and sentiments of other employees, telling employees it had asked other employees about their union sentiments, soliciting grievances and impliedly promising to remedy them, prohibiting employees from talking because of the Union, changing employees' break schedules because of the Union, delaying scheduled employee job changes because of the Union, threatening employees with layoffs because of the Union, requesting employees to report back to it regarding the union sentiments of other employees, more strictly enforcing its existing rules because of the Union, and equating employee support for the Union with disloyalty to the Respondent."

2. Substitute the following for paragraph 2(b).

"(b) Make Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 16, 2004

Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would not find that the Respondent unlawfully discharged employees Greg Jaster and Ben Kelley. They were discharged for violating the Respondent's "zero tolerance" policy concerning hostile physical contact. The decisive factor in the decision to discharge was that there was a physical touching in the course of an argument between the two men.

Under the "zero tolerance" policy, the Respondent has developed a bright line rule that any hostile physical contact between employees results in automatic termination. There has been no showing of any deviations from that policy. The incident between Kelley and Jaster clearly falls within the definition of the rule. By contrast, the other incidents cited by my colleagues are distinguishable inasmuch as none of them involved physical contact. It may well be that, subjectively speaking, some of these other incidents (e.g., threat to use a shotgun) are more severe than the physical touching here. However, the essential point is that the Respondent has an objective and specific rule, and the conduct of the two employees was in breach of that rule.

My colleagues suggest that the touching here was not hostile. I disagree. The two were arguing, Kelly put his finger at Jasper's face, and Kelly physically thrust it aside. There was hostility between the two men, and the physical touching was clearly in that context. This was not a friendly gesture.

My colleagues argue that the delay of 2 weeks before discharging the two men shows that the reason for the discharge were unlawful. I disagree. A discharge is the "capital punishment" of an employment relationship, and an employer should not be condemned for taking the time to consider the matter before imposing that punishment. Concededly, as my colleagues suggest, the Respondent could have suspended the employees pending a decision on the matter. However, for the reasons set forth above, the discharge would nonetheless have occurred under the Respondent's strict rule. The upshot would have been that the two employees would have lost additional pay. I would not penalize the Respondent for allowing the two employees to work until a decision was made.

Finally, the prevention of violence in the workplace is a legitimate and serious concern, and an employer should

be free to establish what constitutes impermissible violent behavior. The Board should not, as here, substitute its judgment for that of the employer.

Accordingly, I would find that the discharges of Jaster and Kelley did not violate Section 8(a)(3).

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union sentiments or activities or the union activities or sentiments of other employees.

WE WILL NOT tell you that we have asked other employees about their union sentiments.

WE WILL NOT solicit grievances and impliedly promise to remedy them.

WE WILL NOT prohibit you from talking because of the Union.

WE WILL NOT change your break schedules because of the Union.

WE WILL NOT delay scheduled employee job changes because of the Union.

WE WILL NOT threaten you with layoffs because of the Union.

WE WILL NOT request you to report back to us regarding the union sentiments of other employees.

WE WILL NOT more strictly enforce our existing rules because of the Union.

WE WILL NOT issue warnings to you because of your union sympathies or activities.

WE WILL NOT equate your support for the Union with disloyalty to us.

WE WILL NOT discharge you because of your union sympathies or activities.

WE WILL NOT discharge you because of your testimony in proceedings before the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings or discharges of the employees named in the above paragraph, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the warnings or discharges will not be used against them in any way.

ROBERT ORR/SYSCO FOOD SERVICES, LLC

Michael W. Jeannette, Esq. and Pedro Arguello, Esq., for the General Counsel.

Clifford H. Nelson Jr., Esq. and *Les A. Schneider, Esq.,* for the Respondent.

James Stranch, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This is a case involving allegations of 8(a)(1) conduct and allegations of several unlawful discharges during and after a rerun election campaign. It was tried on 7 days in August and September 2002, in Nashville, Tennessee. The complaint alleges Respondent violated Section 8(a)(1) of the Act by interrogating employees regarding their union sentiments and activities, interrogating employees about the union activities and sentiments of other employees, telling employees it had asked other employees about their union sentiments, soliciting grievances and impliedly promising to remedy them, prohibiting employees from talking because of the Union, changing employees' break schedules because of the Union, delaying scheduled employee job changes because of the Union, threatening employees with layoffs because of the Union, requesting employees to report back to it regarding the union sentiments of other employees, and more strictly enforcing its existing rules because of the Union. The complaint also alleges Respondent violated Section 8(a)(3) of the Act by discharging six employees and by issuing a warning to one of them.[1] The Respondent filed an answer denying the essential allegations in the complaint. After the

[1] Several allegations in the complaint were withdrawn at the trial.

conclusion of the hearing, the parties filed briefs, which I have read.[2]

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Nashville, Tennessee, where it is engaged in the storage and distribution of food and food service products. During a representative 1-year period, Respondent sold and shipped from its Nashville, Tennessee facility goods valued in excess of $50,000 directly to points outside the State of Tennessee. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party, Teamsters Local Union No. 480, affiliated with International Brotherhood of Teamsters (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent operates a large wholesale food and food service products warehouse and a retail store. It employs warehouse employees who stock the shelves, assemble orders, and load trucks. It also employs mechanics and other maintenance employees, as well as truckdrivers who deliver the orders to customers.

On June 14, 2000, a representation election was conducted among Respondent's warehouse and cash and carry warehouse employees in Case 26–RC–8160. In that election, the Union failed to win a majority of the votes cast, but filed objections to the conduct of the election. The Board ultimately held, in early August 2001, that the election should be rerun. A second election was held on September 6, 2001, and the Union received a majority of the votes cast. Respondent filed objections to the conduct of the election, and an objections hearing was held in October 2001. On November 30, 2001, a hearing officer's report issued in which it was recommended to the Board that the objections to the conduct of the election be overruled. Respondent filed exceptions to the hearing officer's report. Those objections, at the time of the trial herein, were still pending before the Board. After the hearing, the Board issued its Order, *Dattco, Inc.*,[3] and a third election was conducted on January 24, 2003.

[2] On March 26, 2003, counsel for the General Counsel filed a motion to consolidate this case with several additional allegations and with objections to the third election held in the bargaining unit. This would require reopening of the record herein. Respondent opposes the consolidation. I denied a similar motion at the trial in this matter. For the reasons stated on the record on September 9, 2002, I deny the General Counsel's motion to consolidate.

[3] 338 NLRB 49 (2002).

2. Alleged violations of Section 8(a)(1)

(a) The cash and carry store

Respondent operates a retail outlet located a few miles from its warehouse. In August 2001,[4] employee Alva Clark had not revealed her sentiments regarding the Union to management. She testified that she was at the cash register in the Cash and Carry store on a day in mid-August. Cash and Carry Store Manager Willie Swafford, an admitted supervisor, telephoned Clark and told her that he had conducted a poll about the Union among the employees. He asked Clark what she thought about it. He repeated, "Well, what do you think about the Union?" and added, "Do you think we need one and how are you going to vote?" Clark replied that she had not made up her mind. Swafford then asked Clark if there were something he could do or something that could be done to help her make up her mind. Clark said no. Swafford did not testify.

Respondent was made aware that Swafford was questioning employees at the Cash and Carry store, and sent Senior Vice President Barr Ivey and Employee Relations Manager Karen Catron to the store to talk with employees some days after Swafford's call to Clark. They spoke with Clark privately and asked her if anyone had asked about her union sympathies. Clark told Ivey and Catron about Swafford's telephone call to her. Ivey apologized and said that Swafford should not have done that. The two managers told her not to feel intimidated and that it was her decision how to vote.

Respondent also posted a notice to employees at the Cash and Carry store on August 22 stating:

> It has come to our attention that during the week of August 13th, Willie Swafford may have asked some of the employees in the Cash and Carry department how they were going to vote in the upcoming election. This conduct was not authorized by Robert Orr–SYSCO. Swafford was wrong to question you about how you will vote. You have the right to make a choice on whether or not you want a union, without being questioned about your decision. I can assure you that this will not happen again. Further, we at Robert Orr–SYSCO will not interfere with the exercise of your Section 7 Rights guaranteed under the National Labor Relations Act.

The notice was signed by Nick Taras, Respondent's president and chief executive officer (CEO).

Clark testified without contradiction that employees at the Cash and Carry store often talked together when there were no customers present to be waited on, and that such conversations had not been prohibited by Respondent. In about the third week in August, Swafford instructed employees at the Cash and Carry store not to discuss the Union. When he saw several employees standing together talking, he told them to "get busy," and that to do so was "job security."

According to Clark's testimony, up until the September 6 election, employees at the Cash and Carry store took unscheduled breaks at moments when they were not busy. Their breaks, whether taken as one break or taken as several shorter breaks, were to total no more than 15 minutes. There was no evidence presented that this self-scheduling of breaks presented any problems. After the election, Assistant Manager (admitted supervisor) Jeremy Suffrage installed a timeclock at the store,

[4] All dates hereafter will be in 2001, unless specifically stated otherwise.

and posted a schedule for each employee's breaktime. There was no explanation given for the change from self-scheduling to formally scheduled breaks. Neither Swafford nor Suffrage testified at the trial, and thus Clark's testimony was uncontradicted.

Despite the fact that Clark's testimony was uncontradicted, Respondent argues that Clark's testimony is not reliable because of bias, shown by her unfavorable opinion of Swafford's competence elicited on cross-examination. Whether or not this witness believes the store manager to be competent at his job has no bearing on her memory and truthfulness, both of which impressed me as good. I fully credit the uncontradicted testimony of this current employee witness.

(b) Allegations involving Nick Taras

According to the uncontradicted testimony of Tommy Thomas, in August an order selector at Respondent's warehouse, he attended a company-called meeting in the breakroom near the end of August, at which a supervisor spoke concerning his past unfavorable experience with a union. Nick Taras, the president and CEO of Respondent, also spoke at the meeting. During the meeting, Thomas, who did not wear any union insignia during the preelection campaign, had asked a question concerning whether Respondent had laid-off employees in the past. After the meeting, Taras approached Thomas as he was returning to work and asked him what he thought of the meeting. Thomas testified that he did not say much in response. Taras also asked Thomas how he felt about the company, whether he supported the company, and what did he want from the Company. Thomas replied to the first two questions by saying that he showed up and worked every day, and to the last question by saying that he was taking it one day at a time. Taras did not address this incident in his testimony.

Employee Tim Toler had worked about 5 years for Respondent by the summer of 2001; he worked on the night shift. In August, he bid on a day job in warehouse sanitation, was interviewed, and was told by Day Sanitation Supervisor Bobby Underwood that he would have the choice of which of two jobs that were open he wanted, because he had the greatest seniority of the successful applicants. Toler chose a job, and Underwood instructed him that his job would begin on Monday, September 3. The next day, Night Warehouse Manager Steve Owensby informed Toler that Taras had decided that no employee transfers could occur for a week because of the union election on September 6. Owensby told Toler that his move to the day-shift job had been delayed until Monday, September 10. On September 6, Toler was instructed to call Respondent about his job transfer, and eventually learned that his transfer to the day shift had been delayed indefinitely. Toler was ultimately transferred to a day-shift sanitation job in November.

Respondent agreed that Taras had decided to "put a hold" on all employee transfers and promotions during the week of September 6, but gave no rationale for this decision, nor did Taras' memorandum on the subject recite any reason. Despite the hold, employee Charles Brooks Sr., the father of then Assistant Night Warehouse Manager Charles Brooks did begin a day shift sanitation job during the week of the rerun election.

About August 22, Respondent mailed to its employees T-shirts bearing the legend, "Let me be Union Free," along with a letter from Taras urging them to vote no in the upcoming rerun election. During the preceding week, several supervisors had asked employees for their shirt sizes. Some of these conversations will be dealt with below. Some employees wore the company-provided t-shirts to work in the 2 weeks before the election.

(c)Allegations regarding Charles Brook Jr.

Tommy Thomas, an order selector on the night shift, testified that he was approached in late August, a few weeks before the election by Charles Brooks Jr., the assistant night warehouse manager,[5] and asked for his t-shirt size. Thomas told Brooks[6] his size and asked why Brooks was asking. Brooks said that Respondent was going to make some "support your company" T-shirts. When Thomas laughed, Brooks asked why he was laughing and added, "Do you support your company?" Thomas replied by asking, "Does my company support me?" Brooks continued that "we don't need a union in here, all a union will do is have you go on strike." He went on to say that the employees won't make any money if they go on strike, and that they would be the first to be laid off.

James Garza, another employee, testified that about the same time period, Brooks asked him for his shirt size. In response to Garza's question as to why Brooks was asking, Brooks merely replied that Respondent was going to send employees T-shirts.

James Garza further testified that Brooks called him into the supervisory office after his shift was over one night in mid- to late August. No one else was present. Brooks and Garza had a friendly relationship. Brooks asked Garza what he thought about the Union. Garza told Brooks that he didn't think Respondent had a lot to worry about, that Respondent was sure to win. Brooks nevertheless went on to tell Garza why Respondent did not need a union, and to ask Garza to talk with other Spanish-speaking employees and communicate these views to them.

Shortly before the rerun election in September, Garza began to wear prounion T-shirts to work. On two occasions in October, Brooks observed Garza in conversation with another employee, and on each occasion, told only Garza, but not the other employee, to stop talking. On both occasions, the other employee was wearing a "Union Free" T-shirt. On both occasions, Garza responded that it took two to have a conversation.

(d) Allegations concerning Todd White

Todd White was an admitted supervisor in the perishable area of the warehouse. Garza testified that on about August 29, White approached Garza just before his lunchbreak and asked him about the views of employee Fernando Mejia concerning the Union. Garza said that he didn't know. White told Garza that he believed Mejia was telling other employees to support the Union, while telling Respondent that he intended to vote no. White urged Garza to talk with Mejia and persuade him to vote no and also to find out whether Mejia was indeed urging other employees to vote no. Garza's testimony concerning this incident was not contradicted.

(e) Allegations concerning Steve Owensby

One of the allegations involving Owensby was canvassed above. The second allegation concerns a conversation with Chris Shouse, a night-shift order selector. Shouse testified that on September 3 he had a conversation with fellow employee

[5] Charles Brooks was later promoted to night warehouse manager.

[6] All references hereafter to "Brooks" or "Charles Brooks" are intended to refer to this admitted supervisor, and not to his father, Charles Brooks Sr., who is an employee.

Shane Owensby, who is the son of then Night Shift Manager Steve Owensby. The conversation concerned whether wages would go down or stay the same should the employees select the Union to represent them. Some time later during the same shift, Steve Owensby approached Shouse and told him that in collective-bargaining employees can lose money and benefits. Shouse replied that it would depend on what happened in contract negotiations. Owensby then told Shouse if he voted for the Union, he didn't work for Respondent, he worked for the Union.

(f) Allegation concerning Tony Terrell

Tony Terrell was an admitted supervisor in Respondent's warehouse. Employee Chris Shouse testified that Terrell approached him and another employee on the night of September 5, the night before the rerun election. The two employees were talking together. Terrell told them that there was "no talking, no talking, let's go." Shouse testified that he protested that there was no rule against employees talking, but Terrell did not respond. Shouse was wearing a union sticker on this date. Shouse testified without contradiction that ordinarily Respondent maintained no rule against employees talking while they worked.

(g) Allegation of more strictly enforcing rules

Many witnesses testified concerning this allegation. From all the testimony, it appears that on the evening of September 9, at the start of the night shift at 5 o'clock in the afternoon, Todd White and Charles Brooks made an announcement to the assembled employees at the end of their preshift stretching routine. Brooks stated that there was to be no gum-chewing or food in the warehouse, and employees were not to leave their work early for breaks and lunch. This was the first time employees had been at work since the election on September 6, which had resulted in a majority vote for the Union.

It emerged from the ample evidence concerning this issue that Respondent had long had a rule prohibiting gum and food in the warehouse, and reiterated it from time to time, particularly when there was to be an inspection of the sanitary conditions at the warehouse. It also emerged from the testimony that except for inspection times, this rule was only sporadically enforced. The laxity was indeed so great that certain employees regularly carried ice cream through the warehouse in order to take it to the breakroom, and that even some supervisors, including Todd White, habitually chewed gum.

3. Allegations of 8(a)(3) violations

(a) Discharge of Tommy Thomas

Respondent maintained a productivity quota for its order selectors. The system required employees to attain a certain level of proficiency and speed within a few months of being hired, and generally to maintain that level in order to remain employed. There is a somewhat complicated progressive disciplinary system for assessing an employee's performance. The computer which generates employee assignments keeps track of the number of items "pulled" by the employee per hour. If an employee fell below minimum productivity rates (MPR) for one week, he was given a verbal warning (step one). According to the system, if he maintained MPR for the next 90 days, he would revert to a clean slate. On the other hand, if the employee again fell below the MPR, he would be given a written warning (step two). The next step is a final warning (step three), and the fourth failure to achieve MPR within the 90-day period is supposed to result in discharge (step four). If an employee works a full 90 days without falling below MPR at all, he is "rolled back" by one step. If an employee works a full 6 months without falling below MPR at all, he once again starts with a clean slate.

If an employee took time away from his order selecting, such as in order to write up a report on a broken piece of equipment, or if his supervisor talked to him for a portion of his worktime, the supervisor was supposed to subtract that time from the employee's worktime in the computer. Only supervisors could perform this function.

Employee Tommy Thomas, a less-than-1-year employee, had reached step three of the system on March 14. This warning contained the comment that Thomas would be discharged if he failed to achieve MPR for any week before April 29, "90 days after his first disciplinary action." On May 28, instead of giving Thomas a final warning as the system would seem to call for, Respondent gave Thomas a (third) warning, and added the comment that Thomas would receive a final warning if he missed MPR anytime in the next 90 days. On June 11, Thomas was given a final warning, and the comment was added that Thomas would be terminated if he missed achieving MPR at any time in the next 90 days. Within a couple of weeks, on June 28, Thomas received another "final warning" with the comment added that he would be discharged if he failed to meet MPR for any week prior to August 29. Beginning in late August, Thomas began to show his support for the Union by handbilling, wearing union T-shirts, and talking openly at work about his support for the Union.

Even though Thomas had reached the last step of the MPR system on three separate occasions in May and June, and should have been discharged under Respondent's system, he was instead given lesser penalties on all three occasions. Respondent's witnesses had no explanation for this discrepancy. Two weeks later, however, immediately after the election, Thomas was discharged for failing to meet his MPR during the week of the election. The election was held on Thursday, September 6, and the next regularly scheduled shift began on Sunday evening, September 9. Thompson was discharged on September 9.

During the week of the election, Thomas, along with numerous other employees, was below production standards. There was testimony from several witnesses concerning conversations during work time among employees during the week of the election. Charles Brooks talked with Thomas for a lengthy period on at least 1 day, causing an obstruction in one of the cold area's aisles, and holding up the work of a number of employees. Thomas and Utley testified that Charles Brooks told Thomas, Utley, Greg Jaster, and several other employees that he would credit them with time in the computer because of the delay in their work which he had caused. In the record evidence are production figures for the election week showing that indeed some employees' time was changed by handwritten notations, crediting them with "time out" from work. Thus, a highly active procompany employee, Joe Hatley, was apparently credited with time by Brooks, as shown by the handwritten notation and change of his production numbers, bringing his MPR above the failure rate. The same document shows was no such change to Thomas' time and production number, nor to James Utley's production for the week, as had been promised by Brooks.

(b) Discharge of Chris Shouse

Chris Shouse was an order selector on the Cold Dock, which comprises the cold and frozen food areas. In early September, immediately after his conversation with Steve Owensby described above, he began wearing a union sticker on the outside of his work jacket, and thereafter continued to support the Union openly. On October 17, just 2 weeks before his discharge, Shouse appeared and testified in an objections proceeding at the National Labor Relations Board.

On the night of October 31, about 7 weeks after the election, Shouse took his dinner break at about 9 p.m. Employees have 45 minutes for a dinner break, and are permitted to leave the premises for dinner if they wish. Shouse's parents, who live near the Respondent's premises, have traditionally had a Halloween chili supper. Shouse and a friend went to his parents' house for chili at the dinner break. While at the house, he learned that his two daughters, aged 6 and 13 years old, had gone out trick-or-treating, and had not returned. Shouse became concerned, drove around the neighborhood looking for them, and attempted to contact the girls' mother, who he thought might have picked them up. Shouse then began an all-out search for his daughters. After failing to find them in the neighborhood of his parents' house, he drove to the part of town where the girls' mother lives. There was no answer at the house. Finally, after several calls to friends, he located the girls' mother, who told him where the girls were, and permitted him to pick them up. Shouse took them back to his house and put them to bed. Shouse lives about 45 minutes from Respondent's facility.

Shouse testified that twice during the 3 or 4 hours during which he searched for his daughters, he stopped at a pay phone, at about 9 and 11:20 p.m., and called the supervisors' office at Respondent's premises, but there was no answer. There was conflicting testimony about the various telephones at Respondent's facility, but the facts emerged that although there is voice mail on most of Respondent's lines, there is no voice mail on the telephone in the supervisors' office. As supervisors are frequently out in the warehouse during a shift, there is not always someone present in the office to answer the telephone. Shouse testified that this is the phone number he normally called to try to reach supervisors. During the night shift, of course, the main office telephones of Respondent are not answered.

Not long after the end of the evening meal break, Night Warehouse Manager Steve Owensby learned that Shouse had not returned to work. He called Respondent's president at home at about 11 p.m. Taras told Owensby to discharge Shouse.

Shouse eventually reached Owensby by telephone at about 2 a.m., and informed Owensby that he had had a family emergency. Shouse explained that his children had been missing after trick-or-treating. Owensby told him to go to the office on the following day. Shouse was discharged on the following day by Nick Taras. Shouse testified that he tried to tell Taras the circumstances of his emergency, that his daughters had been missing, but Taras interrupted Shouse's attempted explanation and told Shouse that he had personal time for that. Shouse asked why another employee, McCallum, had gotten only a "write-up" for similar conduct, but received no answer. The document recording Shouse's discharge had been prepared prior to the meeting.

It was undisputed that on another occasion, employee McCallum had neither called nor shown up for a scheduled night shift until 2 a.m. Another employee, Daren Ogeer, testified without contradiction that on at least two occasions, he failed to return to work after the meal break, that this was known to his supervisor, and that he received no discipline for his failure to return to work. His supervisor at the time, Nelson Dawson, also testified, and recalled that on one of these occasions he had told Ogeer that he needed to call his supervisor. Dawson characterized this as a verbal warning.

(c) Discharge of James Garza

James Garza was an 8-year employee. He worked as an order selector on nights. In 2000, he played a leading role in the union campaign. In the second union campaign, he did not at first support the Union openly. It was during that time that he was asked to talk with other Spanish-speaking employees about voting against the Union. About 2-1/2 weeks before the September 6 rerun election, Garza decided to support the Union and began wearing a union button and T-shirt to work.

On February 12, 2002, Garza's supervisor assigned him to work which involved taking late-selected items to complete orders that are already loaded on the truck trailers. To do this work, Garza stood on a small motorized "tugger." The tugger Garza used had a light affixed to it, so that it was visible at night in the truck yard. The light was suspended from an overhead bar. Garza testified that the light bar was partly broken on the left side (the bar is welded to the tugger on both sides). On his way out to the yard in the course of his work, Garza proceeded slowly out the door before the overhead door was completely raised, and the top of the tugger's light bar hit the bottom of the door. Garza looked at the door, but was of the opinion that the door, which had previously been hit on several occasions, showed no new damage as a result of his tugger's hit to it. However, the light bar, previously loose at the left weld, was now completely detached there. He therefore removed it from the tugger and took it to the appropriate repair shop. As he did so, he encountered a supervisor named Roger "Snuffy" Brown, and told him that the light bar had come off when he hit the door on the way out of the warehouse. Brown did not testify at the hearing. Garza did not tell any other supervisor about having hit the door.

When asked about the incident by his supervisor a day later, Garza freely admitted that he had hit the door "just a little bit," but that he did not think there was any damage, and therefore did not report it to his supervisor, although he had told Supervisor Brown about the accident.

A day or two later, according to Respondent's witnesses, it was determined that Garza had hit the door, had not reported it, and was terminated for not reporting an accident, and for having a number of safety "incidents" on his past record. A recommendation to this effect had been made by Safety Director Keith McIntyre without any conversation with Garza. Respondent's human resources manager, Merkle, testified that employees are always terminated for failing to report any accident which involves damage to plant or equipment.

Several employees testified that it is fairly commonplace for employees to hit the door which Garza hit, and that it always has dents and scrapes visible on it because of this. Former employee Mark Maraschiello testified that in March 1999, he had hit a warehouse rack while driving a double pallet jack in the freezer area. The collision was hard enough to bend the leg

of the rack up off the ground. Maraschiello did not report the accident. Later that day, he was approached by his supervisor about the damaged rack, and after first denying that he had hit it, admitted that he had hit it, and was suspended for one night. Another employee is called "Crash" as a nickname because of his propensity to hit racks.

(d) Discharge of James Utley

James Utley had worked for five years for Respondent at the time of his discharge in March 2002. During the second election campaign, he had openly distributed union literature, and had been seen by Charles Brooks doing so. Shortly before the election, he was confronted by Brooks at work, who talked with him about the Union and mocked him for supporting it. Utley also customarily ate lunch with five or six other employees who were well known to Respondent as union supporters.

Utley had occasionally failed to meet MPR in 2001. On February 4, he received a verbal warning, but as 90 days elapsed before his next warning, Utley received another verbal warning on June 18. On July 10, he received a written warning (step two). On September 9, he received a final warning (step three) for failing to achieve production during the week of the election. As set forth above in the factual summary concerning employee Thomas, Utley had been told by Charles Brooks that he would credit Utley with time for that week because of Brooks' delay of employees by blocking the aisle, but no credit to Utley was shown on the printout for that week. After 3 months of steadily meeting production quotas, however, he rolled back to a step-two status in December. During February 2002, Utley had knee problems and was absent on family and medical leave through March 10, 2002. On that date, Utley was abruptly discharged for failing to meet production for 2 weeks in February 2002. His supervisor handed him both a final warning for the week of February 3–8, 2002 (dated February 14, 2002), and a discharge based on failure to achieve production during February 17–22, 2002. In that week, immediately before his knee surgery, Utley worked only 3 days. Normally, warnings for the week of February 3–8, 2002, would have been given on February 11, 2002. Respondent offered no credible explanation for the delay from February 11 to March 10, 2002, in giving Utley his final warning. The record reflects that Utley worked at least 4 days during February after the warning is dated.

(e) Discharges of Greg Jaster and Ben Kelley

Greg Jaster and Ben Kelley, both order selectors in the Freezer area, had worked for Respondent for 18 months and nearly 8 years, respectively, by May 2002. Kelley was revealed to Respondent by the Union as a member of its in-plant organizing committee in August. Jaster had not been a union supporter until after the rerun election, but after his change of heart in late 2001, Jaster openly discussed his union support with other employees, including Steve Owensby's son Shane.

Greg Jaster and Ben Kelley, both riding the double pallet jacks they used to assemble their orders, had a near collision in the aisle. Jaster was talking to his supervisor over his shoulder and not looking where he was going. Kelley came out of the door to the freezer without sounding his horn. The two employees, who are normally good friends, began to argue about the near collision, each citing the fault of the other. Both raised their voices. Jaster pointed his finger at Kelley, holding it close to Kelley's face. Kelley moved Jaster's finger aside with a brushing motion of his open hand. At about this time, their supervisor, Bob Suter, came up to the two employees, stepped between them, and told them to stop it. Within a few hours, Jaster and Keley had renewed their usual friendship.

Both Jaster and Kelley were called into Charles Brooks' office, and interviewed about the incident. Two weeks later, both employees were discharged for the incident.

Evidence was introduced of three or four incidents prior to the election campaign in which employees engaged in screaming at other employees, cursing, making threatening gestures such as pounding a fist into the other hand, and running after another employee apparently in order to attack him, all of these incidents known to Respondent. None of the employees involved was discharged, and only one was given a warning. One employee (Jimmy Kelly) who was described by several employee witnesses as particularly short-tempered and aggressive, was physically restrained by James Utley from attacking another employee. A supervisor witnessed this incident and informed Utley that Jimmy Kelly had been "talked to" by the supervisor.

Merkle testified that Respondent always discharges employees for "violence" in the workplace. This is defined, according to Merkle, as conduct which includes any "touching."

B. Discussion and Analysis

1. 8(a)(1) Allegations

(a) Cash and Carry Store allegations

Respondent argues that the only violation established at the Cash and Carry store was the interrogation of Clark (and other employees) concerning their union sentiments, and that this conduct was effectively remedied by Respondent's August 22 notice. Respondent cites *Broyhill Co*., 260 NLRB 1366, (1982), and *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), among other cases, in support of its position. General Counsel argues that there was no effective remedy within the meaning of these cases, since Respondent did not admit its interrogation, that there were other unfair labor practices, both by Swafford and others, which were not mentioned in the notice or which occurred after the date of the notice. The General Counsel cites *Ark Las Vegas Restaurant Corp.*, 335 NLRB No. 97, p. 6 (2001), and *United Refrigerated Services*, 325 NLRB 258, 259 (1998).

First, it is clear that Swafford's questioning of Clark, an employee who had not previously, and did not then reveal her sentiments regarding the union, as to her feelings concerning the union was coercive interrogation, and violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Likewise, it is uncontradicted that Swafford not only informed Clark that he was asking all the employees about their union sentiments, in itself a violation of Section 8(a)(1) of the Act, but continued the conversation by asking her what he could do to help her make up her mind. This last question, the General Counsel argues, should be understood as a solicitation of grievances, and implied promise to remedy them, citing *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1343 (2000). Respondent did not specifically address this issue in its brief. I find, in agreement with the General Counsel, that Swafford's last question to Clark, especially in the context of the rest of the conversation, is objectively understood as a solicitation of grievances, and an implied promise to remedy them. Swafford's question

was far clearer than the one found to be a violation of the Act in the cited case. 330 NLRB at 1343.

Clark also testified without contradiction that in late August and early September, Swafford, who had formerly permitted employees to talk together when no customers were present to be waited on, and indeed had often stood and talked with them, began to instruct employees not to talk, to disperse and to "get busy." He added that it was "job security." The timing of the sudden prohibition on employees' conversations, occurring soon after the announcement of the rerun election, and the addition of the phrase, "job security," are facts which connect the change in rules with the union campaign, and tend to show that it was intended, or intended to be understood, as a prohibition on talking about the Union or the election campaign. I find that Swafford's sudden prohibition on employees' talking together violated Section 8(a)(1) of the Act.

Finally, I find that Respondent's change in employee break practice shortly after the September 6 election, from self-regulated breaks to a formal break schedule, was done in retaliation for employees' support of the Union, and violated Section 8(a)(1) of the Act. Respondent gave no explanation for the change in break schedule that would rebut this interpretation.

Finally, I find that Respondent's August 22 notice attempting to disavow Swafford's interrogation of employees concerning their union sentiments did not meet the requirements of *Broyhill* and *Passavant*. Under the Board's decisions in this area, a repudiation of unlawful conduct must meet certain requirements. A respondent's notice repudiating the unlawful conduct must be timely, unambiguous, specific in identifying the unlawful conduct, and provide adequate notice to the affected employees. Such a notice must also contain assurances that no interference with employees' Section 7 rights will occur in future, and that undertaking must be fulfilled.

Here, publication to the Cash and Carry store employees was inadequate. Respondent did identify one piece of unlawful conduct, Swafford's interrogation of employees, but did not mention any other conduct, such as his solicitation of grievances and implied promise of remedy. Not only was the notice equivocal in its "admission" of interrogation, stating that Swafford "may have" asked employees questions, but the notice itself blames Swafford, and stresses that he, not Respondent, was wrong. Furthermore, while Respondent assured employees that their rights would be observed by Respondent, it did engage in further unfair labor practices, both at the Cash and Carry store location (Swafford's refusal to allow employees to talk together as they had in the past, and Respondent's change in employees' break schedules) as well as at the larger warehouse (see below), and therefore, fails to meet the final requirement of these cases: that it *keep* its promise not to engage in further unfair labor practices.

(b) Nick Taras

With regard to the first incident involving Taras, the questioning of employee Thomas, the record shows that Respondent's highest official questioned an employee about his "support" for the company immediately after an anti-union meeting. Thomas did not wear items which indicated his support or lack of support for the Union, and Taras' questions about "support" for the company occurring when they did can fairly be construed as intended to elicit the employee's feelings about the union. Therefore, I find that Taras' questioning of Thomas was coercive interrogation under Board law. *Rossmore House*, above.

Taras' decision to delay employee transfers and promotions was not specifically identified to be for the purpose of avoiding the appearance of interference with the election, either in his memorandum, nor in Owensby's communication of the delay to Toler. General Counsel argues that this omission means that this gave the delay the appearance of a penalty for the election, and that the delay violated Section 8(a)(1), as did Owensby's announcement of the delay to Toler. I find, in agreement with the General Counsel's argument, that the decision to delay job changes without stating any reason therefor, its announcement to Toler by Owensby, and its application to Toler violated Section 8(a)(1) of the Act. *A.M.F.M. of Summers County*, 315 NLRB 727, 732 (1994), enfd. 89 F.3d 829 (4th Cir. 1996).

Regarding Respondent's mailing of antiunion t-shirts to its employees, the General Counsel does not allege that Taras' letter contains any unlawful material, but simply that provision of the T-shirts with the expectation that some employees would wear them to work constituted indirect interrogation of employees concerning their sentiments regarding the Union. Except in the incidents detailed below, Respondent's actual questioning of employees was limited to asking for the employee's shirt size. The General Counsel cites *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994), in support of its position. In my view, to find Respondent's conduct a violation under that case would be an expansion of Board law. I find that Respondent merely distributed t-shirts to employees, without more. It did so by mail, so that no supervisor would be present to assess the employee's reaction to the receipt of the T-shirt. The only way in which any assessment could be made was by seeing who wore the T-shirts. To hold this a violation of Section 8(a)(1) would be to prohibit any company involved in a representation election from making available to employees any buttons, flyers, hats, or other objects which express sentiments calculated to announce an intention to vote against the union or to persuade other employees to do so. I decline to find Respondent's distribution of antiunion T-shirts a violation of Section 8(a)(1) and I will recommend that this allegation be dismissed.

(c) Allegations regarding Charles Brooks

Brooks' questioning of employees concerning their shirt size, standing alone, or even coupled with the addition of the information that Respondent would be sending them t-shirts does not, standing alone, constitute coercive interrogation, as discussed in the foregoing analysis. Therefore, Brooks' inquiry of James Garza about his shirt size does not violate Section 8(a)(1) of the Act. However, Brooks' questioning of Thomas went further, asking him outright if he supported Respondent, coupled with unfavorable comments regarding the Union and possible consequences of union representation. These possible consequences included the threat that striking employees would be the first selected for layoff. I find Brooks' questioning of Thomas was coercive interrogation, and that both this questioning and the threat of layoff of employees if they selected the Union violated Section 8(a)(1) of the Act.

Brooks' questioning of Garza about his opinion of the Union, and his solicitation to transmit Respondent's position to other employees, taking place, as it did in a private office, included certain coercive elements. Although the two were friendly, the fact that Garza answered by talking about Respon-

dent's chances in the election rather than his own sentiments shows that he was reluctant to reveal them to Brooks. Taken as a whole, I find that the circumstances of Brooks' discussion with Garza stamped the questioning as coercive, and I find that it violated Section 8(a)(1) of the Act.

Likewise, Brooks' postelection directions to Garza to stop talking were patently one-sided, directed at Garza, but not at the employee with whom he was talking. Given the fact that Garza had demonstrated his support for the Union immediately before the rerun election and the other employees involved were wearing Respondent's "Union Free" T-shirts, there is objective evidence from which to conclude that Brooks' admonitions were directed at Garza because of his support for the Union, and were disparate. Furthermore, the record evidence establishes that Respondent had no rule against employees talking. I find that Brooks' oral admonitions to Garza to stop talking violated Section 8(a)(1) of the Act.

(d) Allegations concerning Todd White

White's questioning of Garza about the union views of another employee, Mejia, was a bald request to Garza to ascertain the union views of Mejia. The request to talk to Mejia and find out where he really stood implicitly conveyed to Garza a request to report back to White with any information he found out. Both the question about Mejia's union views, and the request to find out Mejia's views are blatant violations of Section 8(a)(1). While questions about an employee's own views concerning a union may sometimes not be coercive, questions about the union views of *other* employees are nearly always coercive. See, e.g., *Sundance Construction Management*, 325 NLRB 1013 (1998); *State Equipment, Inc.*, 322 NLRB 631, 642–644 (1996).

(e) Allegations concerning Steve Owensby

The General Counsel argues that Owensby's remark to the effect that if Shouse supported the Union, then he worked for the Union, rather than Respondent, implied a threat that Shouse would lose his job if he voted for the Union. I find that it does not imply a loss of job, but is rather an accusation of disloyalty to Respondent, that an employee who supports the Union has higher loyalties to the Union than to Respondent. Whether this kind of statement is violative of the Act is a different issue. I find that Owensby's statement to Shouse violates Section 8(a)(1) of the Act because it equates support for the Union to disloyalty to Respondent. See, e.g., *HarperCollins Publishers*, 317 NLRB 168, 180 (1995).

(f) Allegation concerning Tony Terrell

Tony Terrell's September 5 admonition to Chris Shouse to stop talking is subject to the same analysis as Brooks' remarks to James Garza. There was no rule against talking, and Shouse was wearing a prounion button at the time. I find that Terrell's warning to Shouse violated Section 8(a)(1) of the Act.

(g) Allegation of more strictly enforcing rules

Charles Brooks reiterated Respondent's rules regarding food and gum-chewing in the warehouse and leaving early for breaks at the very first opportunity after employees had voted in favor of the Union. While there is no dispute that these rules existed, it is also clear that they were rarely reiterated and not strictly enforced, except when an inspection was taking place. The timing of this emphasis on strict obedience to the rules gives the appearance of being done in retaliation for the employees' vote for the Union, taking into consideration the backdrop of numerous unfair labor practices outlined above. I find that the unusual reiteration of these rules at the first opportunity after the representation election gave employees the impression that Respondent intended to be stricter because of their vote in favor of the Union, and therefore it violated Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

It is well established that in order to demonstrate a prima facie case of unlawful discharge, the General Counsel must show that an employee engaged in union or protected concerted activities, that the employer knew of those activities, that the employer had some animus against the activities in question, that the employer discharged the employee, and that there was a connection between the employer's animus and its taking action against the employee. In order successfully to rebut a prima facie case, an employer must show that it would have taken the same action against the employee in the absence of any protected activities on the part of the employee.

(a) Discharge of Tommy Thomas

Thomas was an open and outspoken proponent of the Union beginning in late August. He was subject to coercive conduct by Nick Taras and later by Charles Brooks. Brooks' conduct towards Thomas shows that Respondent knew of his union sympathies, and further was hostile towards those ideas. Thomas' discharge occurred on the first workday following the September 6 election. This, as well as the coercive conduct directed at Thomas demonstrate a nexus between his union activities and the discharge.

Respondent has advanced as its reason for discharging Thomas its normal progressive discipline system for productivity. As described above, the complex system results in discharge at the fourth weekly productivity failure without an employee having had any 90-day period free of failures. Thomas, however, had a fourth productivity failure on May 28 (without having "rolled back" any of his previous warnings by having a "clean" 90-day period). Respondent did not discharge him on May 28, but only warned him. It appears that this was putting Thomas back to step two of the system. On June 11, Thomas had another low production week, and was given a final warning. Little more than 2 weeks later, Thomas again had low production, but was inexplicably given another "final" warning. It is obvious from this evidence that Respondent did not consistently or strictly enforce its productivity progressive discipline system. Before Thomas showed that he was a union supporter, Respondent *refrained from discharging him three separate times.* After Thomas showed his support for the Union, he was discharged the next time his productivity fell below requirements. Board law is replete with cases in which a respondent's previous laxity to productivity failures shows that it was the employee's support for the Union which caused it suddenly to become a strict enforcer of its productivity rules. See, e.g., *Gravure Packaging*, 321 NLRB 1296, 1304-06 (1996); *Florida Title Co.*, 300 NLRB 739 (1990).

Furthermore, Respondent's own documentary evidence, the time records for the week of September 3–6, the week for which Thomas was discharged, reveal a glaring disparity in the application of supervisory adjustments. Three witnesses testified credibly that Charles Brooks told Thomas, Utley, and several other employees that he would adjust their times in the productivity calculation, because they had been delayed by his

own blocking of the aisle while conversing with employees. The time records reveal that while Joe Hatley, an outspoken opponent of the Union, had in fact had his time adjusted in order to bring his productivity up above the failure rate, *no adjustment* was made to the time of Thomas or Utley. The issuance of production discipline to Thomas was patently discriminatory. For this reason, too, Respondent's defense fails. See, e.g., *Lampi*, 327 NLRB 222 (1998); *Employee Management Services*, 324 NLRB 1051 (1997). I find that Thomas' discharge violated Section 8(a)(3) of the Act.

(b) Discharge of Chris Shouse

Chris Shouse demonstrated his support for the Union by wearing a union button on his jacket each day at work during the election week. There were two instances found above of coercive conduct by Respondent directed specifically at Shouse. This shows both knowledge and animus on the part of Respondent. Shouse was discharged for one attendance incident. His discharge was decided upon in the middle of the night, by the chief officer of Respondent, and without any investigation of the circumstances of Shouse's absence. The discharge took place within about 7 weeks of the September 6 election. All these factors show a nexus between the discharge and the pointed animus of Respondent towards Shouse's union support. Likewise, the timing of the discharge just 2 weeks after Shouse's testimony in a Board proceeding indicates a connection between Shouse's Board testimony and the discharge.

Respondent has advanced "job abandonment" as the reason for Shouse's discharge. Normally Respondent called a failure to return to work after the lunchbreak leaving early without permission, as former supervisor Nelson Dawson did when discussing employee Daren Ogeer's identical behavior on another occasion. The record shows that employee McCallum was given an oral warning for failing to show up for his night shift at all, and not calling in until 2 a.m. The record is uncontradicted that employee Daren Ogeer was given, at most, an oral warning for doing exactly what Shouse did. Ogeer testified without contradiction that he failed to return to work after the lunch break on *two* occasions without notifying anyone. Still, he was only told to let a supervisor know if he was not going to be back from lunch. This glaring disparity in the treatment of the identical conduct shows clearly that Respondent would most definitely not have discharged Shouse in the absence of his union support. See, e.g., *Hospital San Pablo*, 327 NLRB 300 (1998); *American Crane Corp.*, 326 NLRB 1401, 1413 (1998); and *Weather Shield of Connecticut*, 300 NLRB 93, 96 (1990). I find that Respondent's discharge of Shouse violated Section 8(a)(3) of the Act.

(c) Discharge of James Garza

James Garza was singled out by Respondent for questioning not only about his own views regarding the Union, but was treated as a source of information concerning, and perhaps influence over, the Union views of Spanish-speaking employees. The specific coercive conduct directed at Garza is described above. Clearly, Respondent knew that Garza supported the Union, and just as clearly, Respondent was hostile to Garza's support. Garza was ostensibly discharged for conduct for which other employees had been given only a warning or a 1-day suspension. This disparity, in addition to the coercive conduct specifically directed at him show a connection between the discharge and Respondent's hostility towards his union support.

According to Respondent, Garza was discharged for an accident in the warehouse, and for not reporting that accident. In addition, Respondent attempted to shore up its discharge of Garza by citing every safety violation in his 5-year employment history as additional grounds for his discharge. This was clearly "make-weight," since Respondent did not terminate other employees with greater numbers of safety violations. Garza testified without contradiction that he told a supervisor, Roger Smith, about the accident soon after the accident occurred. Respondent's position ignores this uncontroverted fact. In addition, there is evidence of disparate treatment of Garza. Former employee Maraschiello had a similar minor accident to Garza's, and also did not report it until challenged about it by his supervisor. Maraschiello engaged in arguably worse conduct than Garza, since he initially denied having hit the rack. Garza, on the other hand, freely admitted having hit the door. Respondent has not shown that it "always" discharges employees who fail to report an accident, as claimed. Instead, the evidence shows that at most, Garza would have been given a one-day suspension for failing to report hitting the door, had it not been for his Union support. See, e.g., *Ready Mix Concrete Co.*, 317 NLRB 1140 (1995); *Waste Management of Utah*, 310 NLRB 883, 902 (1993). I find that Respondent's discharge of Garza violated Section 8(a)(3) of the Act.

(d) Discharge of James Utley

James Utley was a union supporter who openly handbilled and customarily ate lunch with other union supporters. That Respondent knew of his union support is shown by Charles Brooks' mocking conversation with him about the Union in early September. Respondent's animus has been shown by the numerous instances of coercive conduct found above. Utley was discharged on the basis of productivity. In unprecedented fashion, he was given two disciplinary actions, a final warning and a discharge, at the same time. Also, this discharge would not have been issued under the system but for a discriminatory warning given him on September 9. As described above concerning Thomas' discharge, Brooks had promised to adjust several employees's time because of the delay in their work which he occasioned them by talking with them and by blocking the aisle so that their work was held up. Brooks accordingly adjusted the time of antiunion employee Hatley, but did not do so for Utley, who he had held up for at least 40 minutes, according to Utley's uncontradicted testimony. Had Utley's time for the election week been adjusted in a nondiscriminatory fashion, he would not have received the September 9 warning. His productivity disciplinary slate would have been wiped clean by more than 6 months of making his production rate every week. Therefore, the two instances of failure to meet productivity in February 2002 should have resulted in only an oral discussion and a written warning: steps one and two of the progressive system. Respondent's misapplication of its productivity discipline to Utley shows that it acted on its hostility towards Utley's union support in order to discharge him. See cases cited above in section B,2,(a). I find that Respondent's discharge of Utley violated Section 8(a)(3) of the Act.

(e) Discharges of Greg Jaster and Ben Kelley

Kelley was one of the Union's in-plant organizing committee, and Respondent had been notified in writing of his role.

Jaster had become openly supportive of the Union and talked with other employees, including the son of Supervisor Steve Owensby. An inference that Respondent knew of Jaster's union support through Owensby is justified, as is the inference that Respondent believed Jaster supported the Union because of Jaster's habit of eating lunch with Kelley and other strong union supporters. It was well known that Jaster and Kelley were good friends, and it was undoubtedly obvious that their friendship was quickly reestablished after the shouting match they engaged in, as they resumed eating lunch together almost immediately.

Respondent asserts that it discharged Jaster and Kelley in May 2002 because of workplace "violence" engaged in by the two employees. Respondent's witness Merkle's testimony that any touching during a confrontation between employees brings it within the definition of "violence" is inconsistent with Respondent's employee handbook, as well as being inconsistent with common sense. "Hostile physical contact" is the handbook's definition of workplace violence. Pointing a finger (as Jaster did) does not come within this definition, nor does pushing aside the pointing finger (as Kelley did). Respondent clearly exaggerated the incident, attempting to make it into "workplace violence" by labeling it as such. Respondent could not really have believed that Jaster and Kelley were about to engage in any violence, since it permitted them to work for an additional 2 weeks in its warehouse. It did not, for example, place them on leave or suspension. A Respondent's exaggeration of the seriousness of an incident is one factor which has been relied upon by the Board to show that the incident is not the real reason for the discharge of an employee. See, e.g., *299 Lincoln Street, Inc.*, 292 NLRB 172, 202 (1988). In that case, as in this one, the respondent not only exaggerated the seriousness of the incident between two employees, it also acted inconsistently with a belief that any immediate threat of harm existed, and it engaged in a pervasive antiunion campaign. All these factors are present in the instant case. From all the evidence, I am persuaded that Respondent would not have discharged Jaster and Kelley for engaging in an argument, but for their union support. I find that Respondent's discharge of Jaster and Kelley violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their union sentiments and activities, by interrogating employees about the union activities and sentiments of other employees, by telling employees it had asked other employees about their union sentiments, by soliciting grievances and impliedly promising to remedy them, by prohibiting employees from talking because of the Union, by changing employees' break schedules because of the Union, by delaying scheduled employee job changes because of the Union, by threatening employees with layoffs because of the Union, by requesting employees to report back to it regarding the union sentiments of other employees, and by more strictly enforcing its existing rules because of the Union, Respondent has violated Section 8(a)(1) of the Act.

2. By discharging Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley, and issuing warnings to James Utley, because of their union sympathies and activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By discharging Chris Shouse, because of his testimony in Board proceedings, Respondent has violated Section 8(a)(4) of the Act.

4. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to remove from the employment records of Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley, any notations relating to the unlawful actions taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Robert Orr/Sysco Food Services, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their union sentiments and activities, interrogating employees about the union activities and sentiments of other employees, telling employees it had asked other employees about their union sentiments, soliciting grievances and impliedly promising to remedy them, prohibiting employees from talking because of the Union, changing employees' break schedules because of the Union, delaying scheduled employee job changes because of the Union, threatening employees with layoffs because of the Union, requesting employees to report back to it regarding the union sentiments of other employees, and more strictly enforcing its existing rules because of the Union.

(b) Discharging employees and issuing warnings to employees, because of their union sympathies and activities or because of their testimony in Board proceedings.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Tommy Thomas, Chris Shouse, James Utley, Greg Jaster, and Ben Kelley, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharges of Tommy Thomas, Chris Shouse, James Garza, James Utley, Greg Jaster, and Ben Kelley, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Nashville, Tennessee locations copies of the attached notice marked "Appendix[8]." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 9, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union sentiments or activities or the union activities or sentiments of other employees.

WE WILL NOT tell you that we have asked other employees about their union sentiments.

WE WILL NOT solicit grievances and impliedly promise to remedy them.

WE WILL NOT prohibit you from talking because of the Union.

WE WILL NOT change your break schedules because of the Union.

WE WILL NOT delay scheduled employee job changes because of the Union.

WE WILL NOT threaten you with layoffs because of the Union.

WE WILL NOT request you to report back to us regarding the Union sentiments of other employees.

WE WILL NOT more strictly enforce our existing rules because of the Union.

WE WILL NOT issue warnings to you because of your union sympathies or activities.

WE WILL NOT discharge you because of your union sympathies or activities.

WE WILL NOT discharge you because of your testimony in proceedings before the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the following employees to their former jobs, and WE WILL make them whole for any loss of pay or other benefits they may have suffered because of our unlawful layoffs of them:

Tommy Thomas
Chris Shouse
James Garza
James Utley
Greg Jaster
Ben Kelley

WE WILL remove from our files any reference to the unlawful warnings or discharges of the employees named in the above paragraph, and notify them in writing that this has been done and that the warnings or discharges will not be used against them in any way.

ROBERT ORR/SYSCO FOOD SERVICES, LLC

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."